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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10 JOHN B. WALLACE,

11 Plaintiff,

12 v.

13 BUSCH ENTERTAINMENT  
14 CORPORATION,

15 Defendant.

Civil No. 09cv2785-L(RBB)

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT**

16 In this personal injury action, Defendant filed a motion for summary judgment, which  
17 Plaintiff opposed. For the reasons which follow, Defendant's motion is **GRANTED IN PART**  
18 **AND DENIED IN PART.**

19 Plaintiff, a California attorney proceeding *pro se*, was injured at SeaWorld San Diego,  
20 which is allegedly owned and operated by Defendant. Plaintiff purchased a ticket to use the  
21 bungee trampoline ("Equipment") at the Xtreme Zone of the park. Before obtaining permission  
22 to use the Equipment, Plaintiff was required to and did read and sign a liability waiver  
23 ("Release"). A SeaWorld employee ("Attendant") was then assigned to Plaintiff. He outfitted  
24 Plaintiff with a harness, which was placed around his waist, and two bungee cords, one  
25 connected to each hip. The Attendant instructed Plaintiff not to flip until the Attendant  
26 determined that it was safe to do so. When the Attendant instructed him to do so, Plaintiff  
27 started to flip. Before and when he began to flip, Plaintiff's arms were outstretched as he held  
28 on to the bungee cords. On his first and only flip, Plaintiff experienced pain in his left arm. He

1 immediately stopped and left the Equipment to seek first aid. Plaintiff later learned he had torn a  
2 tendon in his left biceps.

3 Plaintiff filed a negligence action in state court. Defendant removed it to this court based  
4 on diversity. Subsequently, Plaintiff amended the complaint. In the operative complaint,  
5 Plaintiff alleged claims for strict products liability – design defect, strict products liability –  
6 failure to warn, breach of express warranties – intended use, breach of implied warranties –  
7 intended use, negligent products liability – design defect, negligent products liability – failure to  
8 warn, declaratory judgment, gross negligence, negligence *per se* and negligence.

9 Defendant moved for summary judgment. Rule 56 of Federal Rules of Civil Procedure  
10 empowers the court to enter summary judgment on factually unsupported claims or defenses,  
11 and thereby “secure the just, speedy and inexpensive determination of every action.” *Celotex*  
12 *Corp. v. Catrett*, 477 U.S. 317, 325, 327 (1986). Summary judgment is appropriate if the  
13 pleadings, depositions, answers to interrogatories, and admissions on file, together with the  
14 affidavits, if any, show that there is no genuine issue as to any material fact and that the moving  
15 party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c).

16 The moving party’s burden on summary judgment depends on whether it bears the burden  
17 of proof at trial with respect to the claim or defense at issue. “When the party moving for  
18 summary judgment would bear the burden of proof at trial, it must come forward with evidence  
19 which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a  
20 case, the moving party has the initial burden of establishing the absence of a genuine issue of  
21 fact on each issue material to its case.” *See C.A.R. Transp. Brokerage Co., Inc. v. Darden*  
22 *Restaurants, Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). If the moving party  
23 does not bear the burden at trial, it can meet its burden on summary judgment by pointing out the  
24 absence of evidence with respect to any one element of the claim or defense. *See Celotex*, 477  
25 U.S. at 325.

26 If the movant meets its burden on summary judgment, the burden shifts to the nonmovant  
27 to show summary adjudication is not appropriate. *Celotex*, 477 U.S. at 317, 324. In this regard,  
28 the nonmovant must “go beyond the pleadings” and rely on “evidentiary materials” such as his

1 “own affidavits, or . . . the depositions, answers to interrogatories, and admissions on file” to  
2 designate specific facts in opposition to the summary judgment motion. *Celotex*, 477 U.S. at 324  
3 (internal quotation marks omitted). These evidentiary materials must show that genuine factual  
4 issues remain which “can be resolved only by a finder of fact because they may reasonably be  
5 resolved in favor of either party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).  
6 The nonmovant does not meet this burden by showing “some metaphysical doubt as to material  
7 facts.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

8 When ruling on a summary judgment motion, the nonmovant's evidence is to be believed,  
9 and all justifiable inferences are to be drawn in his or its favor. *Anderson*, 477 U.S. at 255.  
10 Determinations regarding credibility, the weighing of evidence, and the drawing of legitimate  
11 inferences are jury functions, and are not appropriate for resolution by the court on a summary  
12 judgment motion. *Id.*

13 Defendant moved for summary judgment, arguing essentially that the claims are  
14 precluded by the doctrine of assumption of risk, that the products liability and breach of  
15 warranty doctrines do not apply to it and that, to the extent not barred by these legal theories,  
16 Plaintiff lacks evidence to prove his claims. California substantive law applies in this diversity  
17 action. *See Intri-Plex Technol., Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9<sup>th</sup> Cir. 2007) &  
18 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

19 Defendant argues Plaintiff’s gross negligence claim should be dismissed for lack of  
20 evidence and that his remaining negligence claims are barred by the doctrine of contractual  
21 express assumption of risk. “An express assumption of risk is a complete defense to a  
22 negligence claim.” *Moser v. Ratinoff*, 105 Cal. App. 4th 1211, 1217 (2003). It is undisputed  
23 that Plaintiff signed a Release waiving claims connected to his use of the Equipment.

24 Plaintiff argues that the Release should not be enforced under California’s public policy  
25 to protect consumers from injuries caused by defective products.<sup>1</sup> Generally California courts  
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27 <sup>1</sup> To the extent the complaint alleges claims for strict products liability (first and  
28 second causes of action) as opposed to negligent products liability (fifth and sixth causes of  
action), the strict liability claims are addressed separately below.

1 have “concluded categorically that private agreements made in the recreational sports context  
2 releasing liability for future ordinary negligence do not implicate the public interest and  
3 therefore are not void as against public policy.” *City of Santa Barbara v. Super. Ct. (Janeway)*,  
4 41 Cal.4th 747, 760 (2007) (“*Janeway*”) (citing cases) (internal quotation marks and citations  
5 omitted).

6 Plaintiff specifically contends, however, that his case presents a public safety issue rather  
7 than a recreational activity issue because Defendant’s activity was regulated under the  
8 Permanent Amusement Ride Inspection Program, Cal. Labor Code § 7920 *et seq.*, which  
9 includes multiple requirements to ensure equipment safety and proper training of employees,  
10 *see, e.g., id.* §§ 7923-27; 8 Cal. Code of Reg. § 3195.3 *et seq.* Releases are not effective to  
11 shield against liability for statutory violations. *Capri v. L.A. Fitness Int’l, LLC*, 136 Cal. App.  
12 4th 1078, 1085 (2006), citing Cal. Civ. Code § 1668.

13 This issue is raised in the first amended complaint, where Plaintiff alleged Defendant’s  
14 business was regulated under laws pertaining to amusement parks and violated pertinent legal  
15 requirements. (First Am. Compl. at 15, 23 (negligence *per se*)). In its motion, Defendant argues  
16 Plaintiff cannot maintain a claim of negligence *per se* for two reasons.

17 First, Plaintiff testified he was “not aware of any laws, statutes, or regulations that  
18 [Defendant] breached or allegedly violated in connection with the bungee trampoline ride.”  
19 (Joint Statement at 5.) Defendant argues for summary judgment based on this testimony. The  
20 purpose of discovery, including depositions, is to elicit evidence rather than legal argument.  
21 Plaintiff’s testimony therefore does not preclude him from making a legal argument in  
22 opposition to Defendant’s summary judgment motion. Defendant’s first argument is therefore  
23 rejected.

24 Second, Defendant points to Certificates of Compliance, which show that its Equipment  
25 met the requirements of Title 8, California Code of Regulations Section 344.7(b). (Burton Decl.  
26 at 2 & Exh. 4.) The certificates show that the Equipment passed a safety inspection. *See* 8 Cal.  
27 Code Reg. § 344.7(b). Plaintiff does not contend that the Equipment failed to pass a safety  
28 inspection. He argues that the Attendant was not trained on the safe use of the Equipment as

1 required by law. He suggests Defendant violated the Permanent Amusement Ride Inspection  
2 Program because his Attendant failed to instruct him not to grip the bungee cords. (*See* Wallace  
3 Decl. ¶ 2; Suppl. Wallace Decl. at 2.) This evidence supports a reasonable inference that the  
4 Attendant was not properly trained on how to safely use the Equipment. *See Anderson*, 477 U.S.  
5 at 255 (all justifiable inferences drawn in the nonmovant's favor). Defendant did not address  
6 this argument in his reply. Accordingly, there is a genuine issue of fact whether Defendant  
7 violated the Permanent Amusement Ride Inspection Program and thus precluded reliance on the  
8 Release as a defense to negligence *per se*.

9 In the alternative, Defendant relies on the doctrine of primary assumption of the risk,  
10 another "exception to the general rule of due care frequently applied in cases involving sports."  
11 *Eriksson v. Nunnink*, 191 Cal. App. 4th 826, 838 (2011).

12 Primary assumption of the risk means that the plaintiff has voluntarily participated  
13 in a sport that includes various inherent risks, and therefore, the defendant is  
14 relieved of his or her duty to use due care to avoid the plaintiff suffering an injury  
15 as a result of those inherently risky aspects of the sport. The question of whether a  
16 defendant should be relieved of his or her duty is a question of law and policy. A  
17 court must evaluate (1) the fundamental nature of the sport, and (2) the defendant's  
18 relationship to the sport, in order to determine if the defendant should be relieved  
19 of his or her general duty of care. As a matter of policy, a duty should not be  
20 imposed where doing so would require that an integral part of the sport be  
21 abandoned, or would discourage vigorous participation in sporting events. If the  
22 defendant is relieved of his or her duty of care, then the plaintiff's negligence cause  
23 of action is barred.

19 *Rosencrans v. Dover Images, Ltd.*, 192 Cal. App. 4th 1072, 1082-83 (2011) (internal quotation  
20 marks and citations omitted).

21 The issue presented by Plaintiff is whether risk of injury resulting from gripping bungee  
22 cords with outstretched arms is inherent in bungee jumping on a trampoline. Whether a  
23 particular risk is an inherent part of a recreational activity is an issue of law "necessarily reached  
24 from the common knowledge of judges." *Rosencrans*, 192 Cal. App. 4th at 1083 (citation  
25 omitted). Bungee trampoline jumping is an activity where persons tethered to bungee cords use  
26 a trampoline to jump and flip in the air. Given the nature of the activity, injuries to arms arising  
27 from flipping appear to be an inherent risk. However, as an owner/operator offering this  
28 recreational activity, Defendant has a duty to provide a reasonably safe facility. *See id.* at 1084;

1 *Solis v. Kirkwood Resort Co.*, 94 Cal. App. 4<sup>th</sup> 354, 364-66 (2001). This duty requires Defendant  
2 to minimize the risks insofar as possible without altering the nature of the sport. *Rosencrans*, 192  
3 Cal. App. 4<sup>th</sup> at 1084 (internal quotation marks and citations omitted); *see also Solis*, 94 Cal.  
4 App. 4<sup>th</sup> at 364-66. Plaintiff claims he was injured because he performed a flip while gripping  
5 the bungee cords with outstretched arms, when he should have been instructed to hold his  
6 elbows at his side and not to grip the bungee cords but the black straps offered for this purpose.  
7 (Wallace Decl. ¶ 2; Wallace Suppl. Decl. at 2-3.) The Attendant cleared Plaintiff to flip without  
8 providing these instructions and assuring Plaintiff's compliance before clearing him. (*See*  
9 Wallace Decl. ¶ 2; Suppl. Wallace Decl. at 2-4.) Instructing the participants would not require  
10 them to abandon the integral part of the activity, *i.e.*, jumping on a trampoline while tethered to  
11 bungee cords, but would likely minimize the risk of injury. (See Wallace Decl. ¶3 and  
12 discussion below regarding causation.)

13 Accordingly, Plaintiff raised a genuine issue of fact with respect to primary assumption of  
14 the risk as it pertains to his ninth cause of action for negligence *per se*. Because there is a  
15 genuine issue of fact whether the Release or the primary assumption of the risk bar Defendant's  
16 liability on this claim, its motion is **DENIED** in this respect.

17 Defendant maintains summary judgment should be granted on the gross negligence claim  
18 because Plaintiff has no evidence to support gross negligence or that the alleged gross  
19 negligence caused his injury. The court disagrees.

20 Plaintiff's evidence consists of his affidavits and excerpts from the manufacturer's and  
21 Defendants' internal instructions for the safe operation of the Equipment. Defendant objected to  
22 almost every part of Plaintiff's affidavits. (Evidentiary Objections to Decl. of John Wallace;  
23 Evidentiary Objections to Suppl. Decl. of John Wallace.) Unless expressly noted otherwise  
24 herein, the objections are overruled. Plaintiff is competent to provide evidence about what  
25 transpired during the incident in which he was involved. Furthermore, he is competent to  
26 provide evidence about his injury and how he sustained it. Although Plaintiff could have offered  
27 evidence from an expert, he was not required to do so. *See* Fed. R. Evid. 702 (expert opinion  
28 *may* be offered (emphasis added).) Defendant has not cited any binding authority to the

1 contrary. Furthermore, Plaintiff's evidence is not precluded by Federal Rule of Evidence 701.  
2 To the extent Defendant argues that Plaintiff's affidavits lack credibility or are factually  
3 inaccurate, this is not an issue for summary judgment. *See Anderson*, 477 U.S. at 255.  
4 Defendant also argues that Plaintiff's reliance on safety manuals and operating procedures is  
5 irrelevant. To the contrary, the manufacturer's manual and the defendant's own procedures are  
6 relevant and can be used to raise a genuine issue of fact regarding gross negligence. *See, e.g.,*  
7 *Rosencrans*, 192 Cal. App. 4<sup>th</sup> at 1086-87 (reliance in part on safety manual and the defendant's  
8 internal training procedure consistent with the manual).

9 Gross negligence was expressly excluded from the Release. (Joint Statement at 3.) Even  
10 if it were not, as a matter of law, a release is not enforceable against gross negligence because  
11 "public policy generally precludes enforcement of an agreement that would remove an  
12 obligation to adhere to even a *minimal* standard of care." *Janeway*, 41 Cal.4th at 777, 759  
13 (footnote omitted, emphasis in original), citing *Tunkl v. Regents of Univ. of Cal.*, 60 Cal.2d 92,  
14 101, 104 (1963).

15 Gross negligence is not so much a cause of action as it is a "limitation on the defense that  
16 is provided by a release." *See Janeway*, 41 Cal.4th at 780 n.58; *see also Eriksson*, 191 Cal. App.  
17 4th at 857 n.18 (no distinct cause of action for gross negligence under California law absent  
18 statutory basis). Plaintiff is not required to anticipate the defense of release; "instead, the  
19 defendant bears the burden of raising the defense and establishing the validity of a release as  
20 applied to the case at hand." *Janeway*, 41 Cal.4th at 780 n.58.

21 Gross negligence is different from ordinary negligence in that ordinary negligence  
22 "consists of a failure to exercise the degree of care in a given situation that a reasonable person  
23 under similar circumstances would employ to protect others from harm," whereas gross  
24 negligence requires "a want of even scant care or an extreme departure from the ordinary  
25 standard of conduct." *Janeway*, 41 Cal.4th at 753-54 (internal quotation marks and citations  
26 omitted.) Summary judgment may be granted when the claim does not amount to more than  
27 ordinary negligence, although, generally, "it is a triable issue of fact whether there has been such  
28 a lack of care as to constitute gross negligence." *Id.* at 767, quoting *Decker v. City of Imperial*



1 *Beach*, 209 Cal. App. 3d 349, 358 (1989).

2 Defendant argues Plaintiff cannot show gross negligence because he does not contend  
3 that Defendant intentionally caused him harm or knowingly did anything to put him in harm's  
4 way. (*See* Joint Statement at 4-5.) Intent or knowledge are not required to show gross  
5 negligence. What is required is "a want of even scant care or an extreme departure from the  
6 ordinary standard of conduct." *Janeway*, 41 Cal.4th at 753-54 (internal quotation marks and  
7 citations omitted.) This "connotes such a lack of care as may be presumed to indicate a passive  
8 and indifferent attitude toward results." *Eriksson*, 191 Cal. App. 4<sup>th</sup> at 857 (internal quotation  
9 marks, ellipsis and citation omitted). "[M]ost courts have considered that 'gross negligence'  
10 falls short of a reckless disregard of consequences, and differs from ordinary negligence only in  
11 degree, and not in kind." *Decker*, 209 Cal. App. 3d at 358. That Plaintiff does not contend  
12 Defendant harmed him intentionally or knowingly therefore does not preclude him from raising  
13 a genuine issue whether Defendant was grossly negligent.

14 According to Plaintiff, Defendant provided him with an Attendant who assisted him in  
15 strapping on the bungee cords and a harness, and instructed him how to proceed. (Wallace Decl.  
16 ¶2.) The Attendant instructed Plaintiff not to flip until he determined that it was safe to do so,  
17 and Plaintiff did not flip until the Attendant gave him the go-ahead. (*Id.*; *see also* Suppl.  
18 Wallace Decl. at 3 (Defendant's operating procedure directing attendants to instruct the guests,  
19 "please do not jump or flip until I have given you the clearance to do so").) Before and during  
20 the flip, Plaintiff gripped the bungee cords with outstretched arms. (Wallace Decl. ¶2.) Because  
21 the Attendant was only fifteen feet away from Plaintiff and was observing him bounce on the  
22 trampoline before instructing him it was safe to flip (*id.*), it can reasonably be inferred that the  
23 Attendant saw Plaintiff gripping the bungee cords and that his arms were outstretched. He then  
24 instructed Plaintiff it was safe to flip. (*Id.*)

25 This was contrary to the manufacturer's Operations and Maintenance Manual, which  
26 stated, "Warning: never let anyone hold onto the bungee cords." (Suppl. Wallace Decl. at 2.)  
27 Consistently, Defendant's operating procedures directed that a black strap be attached to each  
28 bungee cord and to the harness, and indicated that the strap was used for grip. (*Id.* at 3.) The



1 procedures directed the Attendant to say, “Please place your hold onto the black straps at all  
2 times and do not let go.” (*Id.*, quoting operating procedures.) Before clearing a guest to start  
3 jumping, attendants were directed to perform a “safety check,” which included “[e]nsur[ing]  
4 guests [were] holding on with both hands.” (*Id.*, quoting operating procedures.) As can be seen  
5 in a photograph of a person strapped in the Equipment, if a person is holding onto the straps, as  
6 opposed to the bungee cords, his arms are not outstretched and the elbows are bent at the side of  
7 the person’s body. (Burton Decl. Exh. 1.) Not only was Plaintiff not warned to refrain from  
8 gripping the bungee cords or instructed by his Attendant to hold onto the black straps, the black  
9 straps were not provided to him at all. (*Id.* at 4; *see also* Wallace Decl. ¶2.) Plaintiff was also  
10 not instructed that his elbows should be at his side as opposed to having his arms outstretched.  
11 (Wallace Decl. ¶2.)

12 When Plaintiff was at the apex of his first and only flip, “the bungee cords . . . pulled [his]  
13 arms in a direction opposite to the gravitational pull of [his] legs, which was downwards, toward  
14 the trampoline.” (*Id.* ¶3.) He felt pain in his left arm and immediately left the Equipment. (*Id.*  
15 ¶2.) He later learned that he had torn a tendon. (*Id.*)

16 Based on the foregoing, drawing all justifiable inferences in Plaintiff’s favor, *see*  
17 *Anderson*, 477 U.S. at 255, a jury could reasonably conclude that the manufacturer’s and  
18 Defendant’s procedures were clear and easy to follow. The procedures were provided to ensure  
19 safety of the guests using the Equipment. Compliance with the procedures was easy to ascertain  
20 just by looking at the guest and the Equipment. Because the Attendant instructed Plaintiff he  
21 was safe to flip although the lack of compliance with safety procedures would be obvious to  
22 anyone familiar with them and the Equipment, a jury could reasonably infer either that  
23 Defendant allowed an untrained person to serve as the Attendant or that the Attendant simply did  
24 not care about the outcome. Either way, the jury could reasonably find Defendant’s conduct to  
25 constitute “a want of even scant care or an extreme departure from the ordinary standard of  
26 conduct.” *See Janeway*, 41 Cal.4th at 753-54.

27 Defendant also claims that Plaintiff has no evidence that the alleged gross negligence  
28 caused his injury. Negligence causation depends on whether the defendant’s action or lack

thereof was a “substantial factor in causing the injury.” *Rosencrans*, 192 Cal. App. 4<sup>th</sup> at 1087. Plaintiff described in detail when and how his injury occurred. (See Wallace Decl. ¶¶ 2-3.) From his affidavit, it can reasonably be inferred that Defendant’s alleged gross negligence was a substantial factor in causing his arm injury.

Accordingly, Plaintiff raised a genuine issue of fact with respect to the gross negligence limitation to the defense provided by the Release. Because there is a genuine issue of fact whether the Release bars Defendant’s liability, its motion for summary judgment on the eighth cause of action for gross negligence is **DENIED**.

As to the remaining negligence claims, public policy does not preclude enforcement of the Release. See *Janeway*, 41 Cal.4<sup>th</sup> at 760. The Release provided in pertinent part as follows:

In consideration of Participant being allowed to participate in these rock climbing and/or bungee trampoline activities, Participant EXPRESSLY AND FREELY AGREES as follows:

1. That participation in the rock climbing and/or bungee jumping trampoline may be **DANGEROUS ACTIVITIES**, which involve known and unknown risk of serious personal injury, including death, and damage or loss of personal property. Participant hereby agrees to ASSUME ALL RISK of serious personal injury, including death, and/or damage to or loss of personal property resulting from or in any way connected with preparation for or participation in the Xtreme Zone rock climbing and/or bungee trampoline activities.

2. To **RELEASE, WAIVE AND FOREVER DISCHARGE SEA WORLD, INC.**, its parent, subsidiaries, related and affiliated companies, officers, employees and agents (the “Released Parties”) from any and all claims (other than gross negligence), loss, demands, damages, expenses, lawsuits, causes of action and judgments, whether foreseen or unforeseen, known or unknown, present or future, resulting from, arising out of or in any way connected with Participant’s preparation for or participation in the Xtreme Zone rock climbing and/or bungee trampoline activities, including, but not limited to, any claims for personal injuries, including death, and/or damage to or loss of personal property, **whether caused in whole or in part by the NEGLIGENCE and/or FAULT of the Released Parties** or otherwise.

3. To **INDEMNIFY, DEFEND, and HOLD HARMLESS** the Released Parties from any and all claims (other than gross negligence), loss, demands, damages, costs, expenses (including attorney’s fees), lawsuits, causes of action and judgments for personal injuries, including death, and damage to or loss of personal property, whether foreseen or unforeseen, present or future, known or unknown, resulting from, arising out of or in any way connected with Participant’s preparation for or participation in the Xtreme Zone rock climbing and/or bungee trampoline activities, **whether caused in whole or in part by the NEGLIGENCE and/or FAULT of the Released Parties** or otherwise.

...

**I HAVE READ AND UNDERSTOOD THE FOREGOING RELEASE AND  
ACCEPT AND AGREE TO ITS TERMS AND SIGN IT VOLUNTARILY.**

(Joint Statement at 2-4 (emphases in original); *see also* Ortiz Decl. Exh. C.) “To be effective, . . . a release must be clear, unambiguous, and explicit in expressing the intent of the subscribing parties. The release need not achieve perfection.” *Benedek v. PLC Santa Monica, LLC*, 104 Cal. App. 4th 1351, 1356 (2002) (internal quotation marks and citations omitted).

Plaintiff argues that the Release he signed was ambiguous and therefore should not be enforced to bar Defendant’s liability for negligence. “The determination of whether a release contains ambiguities is a matter of contractual construction. An ambiguity exists when a party can identify an alternative, semantically reasonable, candidate of meaning of a writing.” *Benedek*, 104 Cal. App. 4th at 1357 (internal quotation marks and citations omitted). Although Plaintiff complains that the Release is vague and overbroad in scope, he does not suggest any alternative meaning or point to any extrinsic evidence to assist in the interpretation.

In the absence of extrinsic evidence, the scope of a release is determined by the express language of the release. The express terms of the release must be applicable to the particular negligence of the defendant, but every possible specific act of negligence of the defendant need not be spelled out in the agreement. When a release expressly releases the defendant from any liability, it is not necessary that the plaintiff have had a specific knowledge of the particular risk that ultimately caused the injury. If a release of all liability is given, the release applies to any negligence of the defendant. It is only necessary that the act of negligence, which results in injury to the releasor, be reasonably related to the object or purpose for which the release is given. The issue is not whether the particular risk of injury is inherent in the recreational activity to which the release applies, but rather the scope of the release. [¶] An act of negligence is reasonably related to the object or purpose for which the release was given if it is included within the express scope of the release.

*Benedek*, 104 Cal. App. 4th at 1357-58 (internal quotation marks and citations omitted).

The Release Plaintiff signed is clear, unambiguous and explicit. *See Benedek*, 104 Cal. App. 4th at 1358-59, 1361. It clearly expressed the parties’ intent to release Defendant from all personal injury claims, with the exception of gross negligence, “resulting from, arising out of or in any way connected with [Plaintiff’s] preparation for or participation in the . . . bungee trampoline activities, . . . whether caused in whole or in part by the negligence and/or fault of [Defendant] or otherwise.” (Joint Statement at 3 (emphases omitted).) Plaintiff’s claim that he

1 was injured while participating in bungee trampoline jumping and that his injury was caused by  
 2 Defendant's negligence falls within the unambiguous scope of the release.

3 Accordingly, Plaintiff has failed to raise a genuine issue whether the Release is  
 4 enforceable to bar Defendant's liability on the ordinary negligence claims as alleged in the fifth,  
 5 sixth and tenth causes of action.<sup>2</sup> Defendant's summary judgment motion is therefore  
 6 **GRANTED** with respect to these claims.

7 Next, Defendant argues that Plaintiff's third cause of action for breach of express  
 8 warranties – intended use and fourth cause of action for breach of implied warranties – intended  
 9 use are also precluded by the Release. Plaintiff did not address this argument in his opposition.  
 10 In this regard, Defendant's motion is **GRANTED** as unopposed. *See* Civ. Loc. R. 7.1(f)(3)(b) &  
 11 (c). In the alternative, it is granted because a valid release waives liability for express and  
 12 implied warranty. *Booth v. Santa Barbara Biplanes, LLC*, 158 Cal. App. 4th 1173, 1181 (2008)  
 13 (implied warranty); *Westyle v. Look Sports, Inc.*, 17 Cal. App. 4th 1715, 1748-49 (1993) (express  
 14 and implied warranty).

15 Defendant also maintains that Plaintiff's remaining product liability claims, first cause of  
 16 action for strict products liability – design defect and second cause of action for strict products  
 17 liability – failure to warn,<sup>3</sup> should be dismissed because Defendant is not subject to products  
 18 liability. Plaintiff argues that Defendant is subject to liability because it leased the Equipment to  
 19 Plaintiff for a fee and, alternatively, because it provided Plaintiff with a product and a service.

20 The doctrine of strict products liability applies to manufacturers, retailers, and “others  
 21 similarly involved in the vertical distribution of consumer goods, including lessors of personal  
 22 property . . .” *Ontiveros v. 24 Hour Fitness Corp.*, 169 Cal. App. 4th 424, 430-31 (2008) (citing  
 23 cases). The relevant “distinction for purposes of the products liability analysis [is] between a  
 24 transaction where the primary objective is the acquisition of ownership or use of a product and  
 25 \_\_\_\_\_

26 <sup>2</sup> Because these claims are barred by virtue of the release, the court need not address  
 the issue whether they are also barred by primary assumption of the risk.

27 <sup>3</sup> Defendant included the fifth and sixth causes of action for negligent products  
 28 liability in this argument. The court need not consider these claims and related arguments in this  
 context because they were found precluded by the Release.

1 one where the dominant purpose is to obtain services.” *Id.* at 431 (internal quotation marks,  
2 citation and ellipsis omitted). Accordingly, “[i]n a given transaction involving both products and  
3 services, liability will often depend upon the defendant’s role.” *Id.* at 432. Plaintiff admits that  
4 Defendant provided him with both products and services when he participated in bungee  
5 trampoline jumping. (*See* Opp’n at 13.)

6 The facts of this case as presented by Plaintiff’s evidence are analogous to the facts in  
7 *Ontiveros* and *Ferrari v. Grand Canyon Dorries*, 32 Cal. App. 4<sup>th</sup> 248 (1995). In *Ferrari* a  
8 white water rafting operator provided, for a fee, a raft, white water rafting safety instructions,  
9 and guides for the activity. *Ferrari*, 32 Cal. App. 4<sup>th</sup> at 251. Plaintiff claimed he was injured  
10 because the raft was defective, arguing, like Plaintiff here, that the raft was a product and that the  
11 defendants were subject to strict liability as licensors of the raft. *Id.* at 258. The court granted  
12 summary judgment on the product liability claim, finding that the predominant purpose of the  
13 transaction was to provide a service rather than a product in that the white water rafting  
14 equipment was incidental to the service. *Id.* at 259 (“Defendants did not provide plaintiff with a  
15 raft for her to use. They provided a service, *i.e.*, recreational raft transportation . . . Defendants  
16 provided all the materials for the trip, instructions on rafting safety, and guides to perform the  
17 labor and conduct the activities. Use of the raft . . . was merely an incident to this service.”).

18 In *Ontiveros* a fitness club member was injured while using exercise equipment and sued  
19 the defendant for strict products liability. *See* 169 Cal. App. 4<sup>th</sup> at 428, 434. The membership  
20 agreement provided, among other things, that the defendant was providing “recreational  
21 services.” *Id.* at 427. The plaintiff claimed she never availed herself of any services provided by  
22 the defendant, but just used the equipment without any assistance, training or instruction from  
23 the defendant’s staff. *Id.* at 434-35. In affirming summary judgment for the defendant, the court  
24 held that regardless of whether the plaintiff availed herself of the defendant’s services, the  
25 dominant purpose of the agreement between the parties was the provision of fitness services, and  
26 the defendant therefore could not be held liable for strict products liability. *Id.* at 426, 435.

27 Here the Release stated that was “[i]n consideration for [Plaintiff] being allowed to  
28 participate in . . . bungee trampoline activities.” (Joint Statement at 2.) Nothing in the Release

1 indicates that it was merely for Equipment rental. Plaintiff presented no evidence to support this  
 2 assertion<sup>4</sup> or the assertion that the dominant purpose of the agreement allowing Plaintiff to  
 3 participate in bungee trampoline activities was to provide Plaintiff with the Equipment. To the  
 4 contrary, Plaintiff's evidence shows that, in addition to using the Equipment, he was also  
 5 provided with and relied on the instructions and cues from the Attendant who was assigned to  
 6 Plaintiff individually. (Wallace Decl. ¶¶ 2 & 5.) According to Plaintiff, the Equipment was  
 7 provided to him for a "guided experience." (*Id.* ¶ 5 (emphasis in original).) Based on the  
 8 foregoing, Plaintiff failed to raise a genuine issue whether the dominant purpose of the  
 9 transaction was to use a product, as opposed to obtain a service. Accordingly, Defendant's  
 10 motion for summary judgment on the first and second causes of action for strict products liability  
 11 is **GRANTED**.

12 Finally, Defendant requests attorney's fees based on the indemnity provision in the  
 13 Release. (*See* Joint Statement at 3.) Plaintiff opposes the request, relying on *Myers Bldg. Indus.,*  
 14 *Ltd. v. Interface Tech., Inc.*, 13 Cal. App. 4<sup>th</sup> 949, 962-63, 965-66 (1993) and *Bldg. Maint. Serv.*  
 15 *Co. v. AIL Sys., Inc.*, 55 Cal. App. 4<sup>th</sup> 1014, 1029-30 (1997), which express the principle that  
 16 indemnity clauses generally apply to third party claims and not to claims between the contracting  
 17 parties themselves. Defendant does not disagree. Furthermore, two claims survive Defendant's  
 18 summary judgment motion. Therefore, to the extent Defendant may be entitled to any attorney's  
 19 fees, its request is premature. Based on the foregoing, the request for attorney's fees is  
 20 **DENIED**.

21 For the foregoing reasons, Defendant's motion for summary judgment is **GRANTED**  
 22 with respect to the first cause of action for strict products liability – design defect, second cause  
 23 of action for strict products liability – failure to warn, third cause of action for breach of express  
 24 warranties – intended use, fourth cause of action for breach of implied warranties – intended use,  
 25 fifth cause of action for negligent products liability – design defect, sixth cause of action for  
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27 <sup>4</sup> Plaintiff's and Defendant's affidavits, which each respectively contain conclusory  
 28 statements that the Equipment was, or was not, leased to Plaintiff are insufficient to either  
 support or refute the assertion. (*See* Wallace Decl. ¶ 5, Burton Decl. at 2.)

1 negligent products liability – failure to warn, and tenth cause of action for negligence.

2 Defendant's motion is **DENIED** in all other respects.

3 **IT IS SO ORDERED.**

4  
5 DATED: August 16, 2011

6   
7 M. James Lorenz  
United States District Court Judge

8 COPY TO:

9 HON. RUBEN B. BROOKS  
10 UNITED STATES MAGISTRATE JUDGE

11 ALL PARTIES/COUNSEL  
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